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**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

PEOPLE OF THE STATE OF CALIFORNIA
ex rel. Xavier Becerra, Attorney General of
California,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
EDUCATION and BETSY DEVOS, in her
official capacity as Secretary of Education

Defendants.

No. 3:17-cv-7106-SK

JOINT SCHEDULING PROPOSAL

On October 8, 2019, the Court entered an Order directing the parties to meet and confer and “submit a joint scheduling proposal no later than October 21, 2019.” Order, ECF No. 78 (“October 8 Order”). In the October 8 Order, the Court permitted the parties to propose two schedules, “one assuming the Court finds that the administrative record is already complete, and one assuming that the Court finds that the administrative record is incomplete.” October 8 Order.

The parties have met and conferred and were unable to reach agreement regarding the two alternative schedules, conditioned on whether the Court orders additional completion of the administrative record. Accordingly, the parties set forth their respective scheduling proposals below.

I. Plaintiffs’ Proposal

If the Court finds that the administrative record is complete: Plaintiff has informed Defendants that they would agree to no more than a two-week extension—from October 25, 2019, to November 8, 2019—of the Court’s deadline to produce a privilege log. Counsel in the related *Manriquez* case endorses Plaintiff’s position and agrees that it is consistent with putting both related cases on the same scheduling track.

Plaintiff opposes any greater extension of time, for the reasons set forth in Plaintiff’s opposition to Defendants’ motion to extend the October 25, 2019, deadline. *See* California’s Opposition to Motion to Extend, to be filed on October 21, 2019. In short, Defendants’ motion to extend the deadline another 77 days does not meet the requirements of Civil Local Rule 6-3, demonstrates their lack of diligence, and will further delay reaching the merits of this case, which has been pending for almost two years, to the prejudice of Plaintiff. As Plaintiff points out in its brief, Defendants’ proffered reason for needing more time—to review approximately 54,000 documents, because they do not know why the documents were excluded from the administrative record in the first place—only underscores the irregularity of the agency’s initial record search and review. This disclosure therefore provides further justification for an order requiring Defendants to complete the record. Plaintiff believes a two-week extension (to November 8, 2019) for Defendants to produce the privilege log is reasonable.

1 Plaintiff agrees that any motion challenging Defendant's privilege assertions or any
 2 motion regarding in camera review should be filed within 21 days of the Department's
 3 production of the privilege log.

4 If the Court finds that the administrative record is incomplete: Plaintiff respectfully
 5 submits that Defendants should be given no more than six weeks (42 days) after the issuance of
 6 the Court's order to complete the administrative record and provide an expanded privilege log.
 7 Counsel in the related *Manriquez* case has informed Plaintiff that it endorses Plaintiff's position
 8 and agrees that it is consistent with putting both related cases on the same scheduling track.

9 Plaintiff's proposed timeline of no more than six weeks is triggered by the issuance of the
 10 Court's completion order. This is a reasonable means to ensure an expeditious and timely
 11 production of the completed administrative record and an expanded privilege log. Defendants, in
 12 contrast, request a due date six weeks after their proposed January 10, 2020, date for producing a
 13 privilege log for the current administrative record. Accordingly, Defendants' proposal anticipates
 14 a deadline of February 27, 2020 for the expanded administrative record—more than four months
 15 away from today's date. Defendants contend they need this extra time to review 54,000
 16 documents – and because “any effort” to further complete the record would be “in addition” to
 17 their efforts on the pending privilege log. To the extent Defendants suggest they would duplicate
 18 efforts, Plaintiff respectfully submits that any review of the 54,000 documents be done once, and
 19 that allotting separate reviews for the pending log and an expanded record would be wasteful.¹
 20
 21

22 ¹ While claiming that six weeks would be necessary to search and produce additional documents,
 23 Defendants at the same time contend they already have produced all documents directly or
 24 indirectly considered by the agency in its “discharge decisions.” In limiting the central agency
 25 question to case-by-case adjudications, Defendants, as in their prior certifications, necessarily
 26 elude their obligation to include documents bearing on the agency's broader decision to abandon
 27 and replace its full-relief policy. Plaintiff respectfully submits that Defendants' position that they
 28 would have nothing else to add to the record is untenable and contradicted by Northern District
 of California authority. *See Regents of the Univ. of Cal. v. U.S. Dep't of Homeland Sec.*, No. 17-
 05211, 2017 WL 4642324, at *4 (N.D. Cal. Oct. 17, 2017) (“It is simply not plausible that [the
 agency] reversed policy . . . without having generated any materials analyzing . . . factors
 militating in favor of and against the switch in policy.”).

1 Plaintiff agrees that any motion challenging the Department's privilege assertions or any
2 motion regarding in camera review should be filed within 21 days of the Department's
3 production of a privilege log that is part of an expanded and completed administrative record.

4 **II. Defendants' Proposal**

5 If the Court finds that the administrative record is complete: On October 11, the Court
6 entered an order requiring, among other things, that Defendants produce a privilege log for the
7 entire administrative record by October 25, 2019. Amended Order at 1, ECF No. 81. For the
8 reasons explained in Defendants' motion to extend that deadline, Defendants need significantly
9 more time in order to produce such a privilege log. *See* Motion to Extend, ECF No. 85 ("Extension
10 Motion"). In short, the Department must conduct some level of review of the approximately
11 54,000 documents it collected when compiling the administrative record, determine which
12 documents were excluded on the basis of privilege (as opposed to the basis that they were not
13 considered, directly or indirectly, by the relevant decisionmaker), and log each privileged
14 document by explaining, per the Court's Amended Order, the nature of each document, which
15 privilege is asserted, and whether each document has been produced in response to a FOIA request.
16 *Id.* at 3-4. Consistent with their extension request, Defendants respectfully submit that they be
17 given until January 10, 2020 to produce a privilege log covering the Department's entire
18 administrative record, assuming the Court does not order the Department to complete the record
19 in any way.

20 The parties agree that Plaintiff will then file any motion challenging the Department's
21 privilege assertions within 21 days of the Department's production of the privilege log.

22 If the Court finds that the administrative record is incomplete: Regardless of whether the
23 Court orders the Department to complete the administrative record, the Department needs until
24 January 10 to complete all the work necessary to produce a privilege log for the record that it had
25 produced in this case. If the Court orders the Department to complete the record in some fashion,
26 such as by requiring additional searches, the Department will need additional time to conduct
27 whatever work is required by the Court's completion order, including the logging of any additional
28 documents on an expanded privilege log. Because the Department has already performed

1 extensive searches and collected a significant volume of documents in compiling the
 2 administrative record for the related cases, it is hopeful that significant additional searches will not
 3 be necessary in response to any order to complete the record. The Department will, however, need
 4 to review the volume of documents it has already collected (more than 54,000), *see* Extension
 5 Motion at 3, both for privilege in order to produce a privilege log and for responsiveness to any
 6 further order from the Court. Thus, any effort to respond to an order requiring completion of the
 7 administrative record would necessarily be in addition to the efforts that are already underway to
 8 produce a privilege log for the record that has been certified. To allow the Department sufficient
 9 time to complete this process, Defendants respectfully submit that the Department be given an
 10 additional six weeks, until February 21, to produce a “complete” administrative record and
 11 privilege log based on any further Court order. Defendants believe the parties and the Court can
 12 revisit the propriety of that date as necessary if and when the Court orders the record to be
 13 completed.²

14 The parties agree that Plaintiff will file any motion challenging the Department’s privilege
 15 assertions within 21 days of the Department’s production of a privilege log for any expanded
 16 administrative record ordered by the Court.

17 DATED: October 21, 2019

Respectfully submitted,

18 XAVIER BECERRA
 19 Attorney General

20
 21 ² Defendants note that it is difficult to predict, at this time, what further work may be required in
 22 response to an order requiring completion of the record. If all that is required is that the
 23 Department “include the eight documents referred to in California’s Motion,” *see* Proposed Order
 24 at 2, ECF No. 66-5, the Department could certainly perform that task expeditiously. California
 25 also asks, however, for an order requiring the Department to “revisit and complete the
 26 administrative record, including searching for all documents and materials directly or indirectly
 27 considered by the U.S. Department of Education in making the decision to abandon and replace
 28 its full-relief methodology for defrauded Corinthian borrowers.” *Id.* at 1-2. As Defendants have
 explained, the Department included the documents that were considered, directly or indirectly, in
 making “full-relief” discharge decisions and in adopting the partial relief methodology that
 Plaintiff alleges “abandoned” the “rule” requiring full relief, *see* Defs.’ Opp’n at 2-4, 17-18, ECF
 No. 72. Defendants thus believe that they have produced a complete administrative record and
 would need further guidance from the Court to “complete” the record in the manner Plaintiff
 requests.

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